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From Kennedy to Clinton, Presidents Get Their Judicial Nominees

Choosing Judges

The Senate confirms more than 90 percent of a new President's judicial nominees during his first two years in office. That may be what the Framers anticipated.

Two hundred fourteen years ago this week (on June 5, 1787), the Constitutional Convention turned to the question of a national judiciary. A few days earlier, Governor Edmund Randolph of Virginia had opened their work by outlining the defects of the Articles of Confederation. Randolph put forward 15 proposed changes which were the result of discussions among all seven Virginia delegates as they met daily and awaited the arrivals of delegates from other States. James Madison was the chief thinker behind this "Virginia Plan."

At the time, the "United States in Congress assembled" was meeting in New York City and operating under the Articles of Confederation. The Articles gave to Congress the power to appoint courts, but only for the trial and appeal of crimes and captures committed on the high seas. The Virginia Plan sought to expand the reach of the national courts, so the ninth of Randolph's resolutions proposed that "a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature."

In the debate of June 5, James Wilson of Pennsylvania opposed having the legislature appoint judges because the consequence would be "intrigue, partiality, and concealment." On the other hand, John Rutledge of South Carolina said that vesting the appointment power in an executive smacked of monarchy. Madison tended to agree with both points, and wondered if the power might be given to "the Senatorial branch" where there would be enough members to answer Mr. Rutledge's objection but not so many as to offend Mr. Wilson. Alexander Hamilton seems to have first suggested that the executive authority nominate but the Senate be given "the right of rejecting or approving," but the Convention was not yet ready to agree to Hamilton's suggestion.

When the Convention returned to the subject on July 18, Nathaniel Gorham of Massachusetts seconded Hamilton's idea. Gorham proposed that judges be nominated and appointed by the executive officer "by and with the advice and consent of the second branch" of the legislature, a procedure that his State had used successfully for 140 years. Gorham's motion failed.

Three days later, the Convention gave the power to *appoint* judges to the Senate, but that decision would not stand. When the Convention returned to the issue in early September, it took away the

power to appoint. The Convention finally provided that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States . . . which shall be established by Law" [Art. II, sec. 2].

In *Federalist* No. 66, Hamilton reiterated the decision of the Convention. "There will, of course, be no exertion of *choice* on the part of the Senate," he wrote. "They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose* — they can only ratify or reject the choice of the president." Recent remarks by some Senators are to the contrary, perhaps, but it is Hamilton who is right.

The executive was designated to choose judges, Hamilton continued in *Federalist* No. 76, because the "sole and undivided responsibility of one man will naturally beget a livelier sense of duty," and a "single well-directed man by a single understanding, cannot be distracted and warped by that diversity of views, feeling and interest, which frequently" affect the decisions of a legislative body. Nevertheless, the Constitution requires the concurrence of the Senate because "It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."

The table below shows how quickly the Senate has acted on the judicial nominees of a new President. With only the exception of President Ford's anomalous term, the Senate has confirmed more than 90 percent of a President's nominees to the courts during his first two years in office. Even this statistic might obscure a President's rate of success, however, because some readers might infer that a 90-percent success rate implies a 10-percent failure rate. That is an invalid inference. Often, the Senate simply does not have time to consider all of a President's nominees during the first Congress of his presidency. A 90-percent approval rate means merely that of all the nominations received by the Senate in a Congress, 90 percent were approved during that two years.

Court of Appeals and District Court Nominees Confirmed During a President's First Two Years in Office, Combined Percentage of All Such Nominations Received

President	Senate and President of Same Party	Senate and President of Different Parties
Kennedy	98.9%	
Johnson (1965-66)	96.7%	
Nixon		92.8%
Ford (1975-76) [includes a presidential election year]		82.7%
Carter	92.8%	
Reagan	97.8%	
Bush		93.3%
Clinton	90.1%	

Written by Lincoln Oliphant, 224-2946

Sources: The account of the Constitutional Convention is taken from the indispensable M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1937 rev. ed.), Vol. I pp. 21, 119-20, 128; Vol. II, pp. 44, 72, 183, 498. Hamilton's writings are from THE FEDERALIST No. 66, at 449, & No. 76 at 510-11, 513 (J.E. Cooke ed., 1961). The chart was prepared by RPC using data from CRS (D. Rutkus, CRS Memorandum, "Judicial appointments and vacancy statistics, 1977-1999" (dated Jan. 3, 2000)), supplemented for 2000 with data from the Administrative Office of the U.S. Courts, and supplemented for years

before 1977 by data from the Calendar of the Senate Judiciary Committee. RPC intern Jordan Heller, Princeton University class of 2002, did the research for the earlier years. President Ford's term, which is shown in the chart, is "anomalous" because his first full Congress included a presidential election, and confirmation rates always drop in those years. His first Congress would have been a second Congress for an elected President. Supreme Court nominees are not included in the data but would make very little change in the percentages shown.